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No. 651

In The

Supreme Court of the United States

October Term, 1961.

PAUL E. RHODES, PETITIONER,

V.

MAURICE SIGLER, RESPONDENT.

REPLY AND SUPPLEMENTAL BRIEF or in the alternative to be considered as an original application to this court for Writ of Habeas Corpus.

PAUL E. RHODES, *pro se*,
Convict No. 22107,
Nebraska State Penitentiary.

Infamous punishment without being tried for or convicted of a crime.

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REPLY AND SUPPLEMENTAL BRIEF or in the alternative to be considered as an original application to this court for Writ of Habeas Corpus.

QUESTIONS PRESENTED FOR REVIEW

Questions are as set out in petitioner's petition and certainly contain a Federal question; deprivation of Federal Civil Rights contrary to the United States Constitution where petitioner was tried in absentia and as stated at page 3 of appellee's brief in the Nebraska Supreme Court, respondent in this action stated: "at the time of the granting of the writ of error, the Supreme Court also suspended execution of sentence. . ." Thereafter the sheriff of Morrill County took the appellant into custody and incarcerated him in the Ne-

braska State Penitentiary. The questions are set out in petitioner's petition and presents the Federal questions of Involuntary Servitude and denial of due process and equal protection of the law and arrest without a warrant are Federal questions involving the IV, V, VIII, XIII and XIV amendments of the United States Constitution.

STATEMENT OF THE CASE

The respondent raises in his brief in this court Section 29-1001, R. R. S. Neb. 1943, the first time this section of the Statute was raised or came into the litigation was in the opinion of the Nebraska Supreme Court. A check of the record will reveal that it was not raised by respondents in the Lancaster County District Court or in his brief to the Nebraska Supreme Court, and nowhere did the respondent claim in the Lancaster County District Court, or in his brief to the Nebraska Supreme Court that petitioner was not serving the sentence. The commitment contained in petitioner's petition in this court, appendix pp. 31-32 shows the clerk of the Morrill County District Court filed the return commitment executed by the sheriff on January 24. 1961; further at p. 33 the appendix contains a copy of the sheriff's return to the executed commitment:

> "Received this Commitment on this 25th day of November, 1960 *and as commanded by this commitment* I on the 23rd day of January, 1961 delivered the within named Paul E. Rhodes to the Nebraska Penitentiary at Lincoln, Nebraska."

which shows exact execution of the commitment pursuant to its terms in plain common English. Then in petitioner's petition, appendix p. 33, we have respondent's receipt to-wit (R.82):

"NEBRASKA STATE PENITENTIARY

Lincoln, Nebraska, Jan. 23, 1961.

To the Clerk of the Court:

This Doth certify, That Norval E. Houston, Sheriff of Morrill County, Nebraska, did on the date hereof, deliver to the Nebraska State Penitentiary at Lincoln, Nebraska, the body of Paul E. Rhodes, who was *tried*, *convicted*, and *sentenced* at the April term, 1960, of the District Court of said County, held at Bridgeport, Nebraska, April 18, 1960.

/s/ Maurice Sigler,
Warden of Penitentiary"

showing in writing the complete execution of the sentence. The commitment was made on January 23, 1960, by the terms of these instruments was for the sole purpose of the execution of the sentence and making petitioner serve said void sentence as a convict which in fact was respondent's contention and treatment of petitioner. In fact his oral argument in court was that bond had to be posted to suspend the running of the execution of the sentence. Contrary to his argument in this court at page 9 of his brief, he is attempting to mend his hold, in other words after the Nebraska Supreme Court's decision and after petitioner has been made to serve the sentence once, he changed his position and refused to discharge petitioner, mended his hold at completion of sentence; this was all pointed out to the Nebraska Supreme Court in petitioner's motion for rehearing and brief in support thereof, a copy of which is attached to the record in this case and contained at pages 17 through 26 of said brief.. It will be noted petitioner was committed January 23, 1960, the petition was filed in this action in the District Court

on January 26, 1960, three days thereafter and hearing held thereon, and nowhere did respondent contradict for the record or anywhere else did respondent contend he was not enforcing the commitment and no such contention was raised until the opinion of the Supreme Court of Nebraska raised it in its opinion of June 23, 1961, and petitioner carefully pointed out to said court its mistake on pages 24 and 25 of the brief in support of Motion for Rehearing; pointing out that respondent had furnished petitioner the date of July 5, 1961, when the lawful requirements of the sentence would be completed pursuant to the commitment of November 25, 1960, on which he was committed on January 23, 1961, as Convict No. 21675 to the Nebraska State Penitentiary, p. 24 of said brief:

> "Appropos of this on February 18, 1961, and on June 10, 1961, in *The Forum*, a weekly newspaper published in Lancaster County, Nebraska, Maurice Sigler published notice that Convict Rhodes, Number 21675 (relator in this action) was up for classification hearing along with the other convicts in the same orientation class, and published notice in issue of June 10, 1961, that relator, Convict Rhodes, Number 21675, was up for classification hearing review, which is the work assignment hearing (hard Labor, involuntary servitude) along with the other convicts that were in the same orientation class which notice reads as follows:
>
> 'Classification Hearing . June 13, 1961.
>
> REVIEW
>
> | | |
> |---|---|
> | Jackson, D. | 21671 |
> | Lucky | 21672 |
> | Bell | 21673 |
> | Jackson, A. | 21674 |
> | Rhodes | 21675 |
> | McCartney | 21676 |

Smith	21677
Richards	21678
Montalva	21680
Stayemeizer	21681'

It would seem, therefore, that respondent is in no position at this time to deny the facts that he published the FORUM, because one being held for safe keeping only, is not subject to orientation, does not have a number and is not called before the classification board for hearing on work assignments and respondent, Warden Sigler, is estopped by his actions in claiming or asserting that he did not make relator, Rhodes, Convict Number 21675, serve said sentence pursuant to commitment of November 25, 1960 (R82,83,84,85) and that said sentence has been executed. Therefore, the court's statement to-wit:

'He is not being held as one serving the sentence imposed in that action' is completely erroneous and does not correspond to the facts and actions of the respondent."

which facts and true statement of the actions of respondent were not denied, the record reveals, but the Nebraska Supreme Court for some reason refused to recognize or give weight to the truth when called to their attention as shown by its action in overruling petitioner's motion for rehearing, a copy contained at page 38 of the appendix of petitioner's petition herein.

The record shows the first time Section 29-1001, Revised Statutes of Nebraska, was in any contention plaintiff was held thereunder was the opinion of the Nebraska Supreme Court of June 23, 1961, which invoked a new issue and mend of the hold in the case contrary to the record and facts of the case. obviously done in an attempt to protect respondent from liability for having

falsely imprisoned. Petitioner immediately responded by filing motion for rehearing and brief in support thereof.

The journal entry of November 21, 1960, contained in the petition to the District Court of Lancaster County, Nebraska, to-wit:

> "The defendant was not present and was not represented by counsel—This matter came on further to be heard upon its merits—"

Thereafter on January 16, 1961, at the direction of Sheriff Houston of Morrill County, Nebraska, petitioner was deprived of his liberty without a warrant by sheriff of Cheyenne County, Nebraska, on the claimed authority of the commitment of November 25, 1960, and journal entry of November 21, 1960, copy printed at page 31, appendix A (R.82) of petitioner's petition herein, thereupon applied to District Court of Cheyenne County, Nebraska, for writ of habeas corpus to Honorable John H. Kuns, District Judge, which writ was granted by the court and issued by the clerk, petition almost identical to the petition to Lancaster County District Court, petitioner was produced before the court, hearing held, petitioner remanded to jail, pending further hearing, thereafter on same day on court's own motion, petitioner was found to be unlawfully deprived of his liberty and was by the District Court of Cheyenne County, Nebraska, discharged from custody, and was given his liberty and freed, a copy of said proceedings are printed at Appendix B, pages 25-33, herein of this supplement brief or in alternative original application for a writ of habeas corpus and certified copy thereof filed in this court with this brief, except exhibits which were attached to petition, which would

be same as exhibits attached to Lancaster County Petition and are bulky and cumbersome, except the commitment, return of sheriff, warden's receipt which was not filed in the District Court of Morrill County, Nebraska, until January 24, 1961, eight days later, and petitioner enjoyed seven days of liberty before re-arrest without any order of court or warrant authorizing the same on January 23, 1961, and execution of the commitment, Appendix A, pages 31, 32 and 33 (R.82,83,84) of petitioner's petition herein. The Cheyenne County Habeas Corpus proceeding was not pleaded in the Lancaster County District Court as ground for writ and res judicata of the ground therein for granting issuance of the writ for reason it was not final judgment as the thirty day appeal time had not elapsed on January 26, 1961, the State could appeal, but the State did not appeal and the same is now a final judgment, res judicata.

In a district court petition in Nebraska you do not ordinarily designate all the Constitutional provisions raised in the petition, pleader is only required to plead facts that by the facts raise the Constitutional questions.

ARGUMENT

I.

The District Court of Morrill County Had No Jurisdiction Over the Body of the Petitioner on November 21, 1961 in the Contempt Proceeding and the Supreme Court of Nebraska Acquired No Jurisdiction Over the Body of Petitioner by Reason of Error Proceedings. Supreme Court Acquired No Jurisdiction by Error Proceedings Not Vested in Trial Court, and Trial by

ABSENTIA Gave Trial Court or Supreme Court in Error Proceeding Got No Jurisdiction Over Body of Petitioner.

In Nebraska prosecution for a criminal contempt is not strictly speaking, a criminal proceeding, it is in the nature of a criminal proceeding and is governed by the strict rules applicable to prosecution of a crime. *Gentle v. Pentel Realty Co.*, 120 Neb. 630, 234 N. W. 579.

> "Proceedings to punish party for contempt of court are equivalent to prosecution for a misdemeanor."

In *Harman v. State*, 154 Neb. 626, 74 N. W. 2d 1079, the court said (Syl. 1):

> "A proceeding against a party for contempt is in the nature of a prosecution for a crime and the rules of strict construction applicable in criminal proceedings are governable therein."

In *State ex rel. Wright v. Barlow*, 132 Neb. 166, 271 N. W. 282, it was said:

> "This court has held that a prosecution for criminal contempt is governed by and in accordance with strict rules applicable to criminal prosecutions. In Haydock v. State, 59 Neb. 296, 80 N. W. 902, we said: 'We have repeatedly held that proceedings in contempt are in their nature criminal, and no intendments will be indulged to sustain a conviction for contempt of court.' See Harves v. State, 46 Neb. 149; Wilcox v. State, 46 Neb. 402; O'Chandler v. State, 46 Neb. 10; Zimmerman v. State, 46 Neb. 13. See also, Bee Publishing Co. v. State, 107 Neb. 74, 185 N. W. 339; McCauley v. State, 124 Neb. 102; Maryott v. State, supra, tender the above authorities, we hold that a prosecution for criminal contempt is governed by the strict rules applicable to prosecution by indictment."

The Nebraska Statute defines Felony and Misdemeanor in 29-102, R. R. S. 1943, Reissue 1956:

> "Felony and misdemeanor defined. The term 'felony' signifies such an offense as may be punished with death or imprisonment in the penitentiary. Any other offense is denominated a 'misdemeanor'.

In *Wright* v. *Barlow*, 132 Neb. 166, 271 N. W. 282, the court held:

> "While a prosecution for contempt has many of the attributes of a criminal proceeding, one so charged is not entitled to a jury trial."

In *Smolczyk* v. *Gaston*, 147 Neb. 681, 24 N. W. 2d 862, the court held:

> "Under the holdings of this court, contempt is not a crime although in the nature of a criminal proceeding. Butterfield v. State, 144 Neb. 388, 13 N. W. 2d 572."

It now being established that a contempt prosecution is triable according to the strict rules of criminal procedure, we look at the statutory procedure, 29-2001, R. R. S. Neb. 1943, Reissue 1956:

> "No person indicted for a felony shall be tried unless personally present during trial; persons indicted for misdemeanor may, at their own request, by leave of court be put on trial in their absence. The request shall be in writing and entered on the journal of the court."

and 29-2201, R. R. S. Neb. 1943, Reissue 1956:

> "Before the sentence is pronounced, the defendant must be informed by the Court of the verdict of the jury, and ask whether he has anything to say why judgment should not be passed."

The Nebraska Supreme Court in reference to said statute in a contempt proceeding, *Kope* v. *State*, 124 Neb. 363, 246 N. W. 718, said in Syl. 5:

> "Where the record fails to show affirmatively that the court, before pronouncing sentence, informed defendant that he had been found guilty, and there is no showing in the record to the contrary, it will be presumed such information was given."

The case at bar is not silent, the petition set forth the order of the District Court of Morrill County, Nebraska:

> "The defendant was not present and was not represented by counsel. . . ."

Thereby clearly showing on the face of the record the Nebraska Statutes were not complied with.

Nebraska has no contempt case imposing imprisonment in absence of defendant, but we do have 29-2001, R. R. S. 1943, supra, and from that we must go to other jurisdictions which are few where courts have gone so far from Constitutional guarantees as to impose imprisonment in absence of accused, by trial in absentia, but there are a few and all hold the imprisonment void for want of jurisdiction over the person, in court to commit a person, defendant, to jail or penitentiary in his absence, *trial in absentia*, and so set forth in 17 C. J. S. 86, p. 124:

> "An order of commitment should show that the person found guilty was present in court at the time the punishment for the offense was imposed and a judgment which fails to make such a showing is void."

Such a proposition is sustained by *Liebman* v. *People*, 282 Ill. App. 582 and *People* v. *Stein*, (Ill.) 12 N. E. 2d

824. It was said in *Pelz* v. *Pelz*, 169 N. Y. S. 430, 182 App. Div. 923:

> "Where a person is beyond the jurisdiction of the Court—a motion to punish him for contempt will be denied as futile."

And it further stated at 17 C. J. S. 88, p. 129:

> ". . . an order of commitment in absence of defendant is absolutely void and the order must show the defendant's presence at the time."

The Georgia Court of Appeals held in *Auto Highball Co.* v. *Sibbert*, 11 Ga. App. 618, 75 S. E. 914:

> "The judgment entered for contempt by the judge of the state court was clearly void . . . this being a criminal prosecution, the judge had no power to impose sentence in absence of respondent. The proper course to have followed would have been to have issued an attachment for the person who failed to respond to the rule nise for contempt, have him arrested and brought into court in the manner provided by law. The sentence of the court imposed upon the respondent in his absence was *absolutely void and cannot be enforced against him.*" (Emphasis supplied).

And the West Virginia Supreme Court of Appeals in *Mylius* v. *McDonald*, 61 W. Va. 405, 56 S. E. 602, 10 A. L. R., N. S. 1098, 11 Ann. Cas. 812, held:

> "The record shows no presence of Mylius at the time when order of arrest and imprisonment was made. Its construction is that he was absent. It must show his presence, as stated above, a proceeding for contempt is a criminal proceeding. Judgment of imprisonment cannot be rendered in the absence of the person.—The judgment of imprisonment, having been rendered in the absence of

> Mylius, is *utterly void*, because the authorities just cited show that the judgment of imprisonment must be in the presence of the accused. A Court may impose a fine in his absence. It may try him after legal notice, for a misdemeanor, without his presence; *but never* can it impose imprisonment without his presence. It *must by proper process, get him before the court in BODY*. That process, in case of contempt, is called an 'attachment', which is used in chancery language, only as another word for common law 'Capias'."

This court will note that on page 2 (R.9,10) of petitioner's petition to the District Court of Lancaster County, Nebraska, petition attached to his petition as Exhibit A and made a part thereof the certified copy of the Morrill County District Court Contempt proceedings through January 24, 1961, including the suspension of the judgment of November 21, 1960, on December 23, 1960, by the Nebraska Supreme Court, and the executed commitment of the clerk of the District Court of Morrill County, Nebraska, showing issue date of November 25, 1960 (R.84), showing the sheriff's return showing execution of the sentence and commitment and warden's receipt showing execution of commitment. reprinted at pages 31, 32, 33 (R.83.84,85) of petitioner's petition Appendix A herein, but the certified transcript made a part of the petition contains almost 100 pages (R.9-90) and is part of the record before this court in the record, and shows that nowhere was this petitioner ordered into custody and nowhere was the sheriff issued a warrant or attachment to deprive this petitioner of his liberty. The record clearly shows the *whole, sole*, and only *pretend cause* or *excuse* for deprivation of petitioner's liberty was said commitment which contains this language at page 32, Appendix A (R.84), of

petitioner's petition herein to-wit:

> "You are therefore commanded to proceed to execute said sentence and order of court."

and sheriff's return petitioner's petition herein, Appendix, page 33, to-wit (R.84):

> "Received this commitment on the 25th day of November, 1960 and as commanded by this commitment I on the 23rd day of January, 1961, delivered the within named Paul E. Rhodes to the Nebraska penitentiary at Lincoln, Nebraska.". (R.84)

No clearer language could be used to show the *clear, sole* and *only cause* for *delivery to* the penitentiary was for the SOLE and only purpose of executing the sentence pursuant to the command of the commitment, which was not on file in the District Court of Morrill County, Nebraska, on December 23, 1960, as showing by the signed filing of the clerk made a part of petition in habeas corpus (R.82,83,84) and contained at appendix of petitioner's petition herein at page 32 (R.82, 83, 84, 85) and the warden's receipt contained at appendix of petitioner's petition herein at page 33 (R.82).

> "NEBRASKA STATE PENITENTIARY
>
> Lincoln, Nebraska, Jan. 23, 1961
>
> To the Cierk of the Court:
>
> This Doth certify, That Norval E. Houston, sheriff of Morrill County, Nebraska, did, on the day of the date hereof, deliver to Nebraska State Penitentiary at Lincoln, Nebraska, the body of Paul E. Rhodes who ws tried, convicted, and sentenced at the April Term, 1960, of the District Court of said county held at Bridgeport, Nebraska, April 18, 1960.
>
> /s/ Maurice Sigler,
> Warden of Penitentiary"

No clearer language of execution of sentence could be stated by respondent. The commitment was not held but was returned as executed and filed to the Clerk of the District Court of Morrill County as executed (R. 82,83,84,85) and warden's receipt for execution of the commitment was issued pursuant to Section 29-2401, R. R. S. Neb. 1943, set out in full at pages 9 and 10 of petitioner's petition in this court. The commitment was not before the Supreme Court of Nebraska in the error proceeding and could not have been before the Nebraska Supreme Court for the reason said error proceedings were filed in said court on December 19, 1960 (R.81) and said commitment to penitentiary (R.82-84) was not filed until January 24, 1961, in the District Court of Morrill County, Nebraska, thirty-six days after the filing of the error proceeding and therefore was not before the Nebraska Supreme Court for determination in the error proceeding but was clearly pleaded in case at bar by making the same a part of the petition in the case at bar and respondent should not after he has made petitioner serve said void sentence pursuant to the commitment be permitted to *mend his hold* and deny or evade the truth that he has made petitioner serve the sentence of infamous punishment and continues in violation of the XIII and XIV amendments of the United States Constitution to impose infamous punishment on petitioner and deprive petitioner of his liberty.

The Texas Court held in *Love* v. *State*, (1913) 71 Tex. Crime 259, 158 S. W. 532:

> "The Court has no power or authority to try one accused of a misdemeanor, in his absence, over his attorney's protest and objection for him, if he was

> sick, and absent on that account, his case should not have been forced to trial. If the Court was satisfied that he was feigning sickness, or was not in fact sick, so as to prevent his appearance, he should have forfeited his bond, issued another writ for his arrest, and had the accused brought into court and then proceeded with the trial."

Wheeler & Mfg. Co. v. *Boyce*, 36 Kan. 350, 13 Pac. 609, 59 Am. Rep. 571:

> "The question of the validity of a sentence for criminal contempt, rendered in the absence of contemnor does not seem to have been raised, except in two cases. The lack of authority is due, doubtless, to the fact, that, as has been pointed out, the courts are unanimous in looking upon such proceeding as *stricti juris;* hence the accused is entitled to the same safeguards as a criminal prosecution. Therefore a final judgment rendered in the absence of the accused one accused of a criminal contempt—is void."

Accordingly, it was held in *Welch* v. *Barber*, 52 Conn. 147, 52 Am. Rep. 567:

> "That where the act alleged to be a criminal contempt was equivocal and might or might not be contempt, and it was necessary to examine witnesses to determine that the question, the party accused *must be present*, and must be given opportunity to be heard in his own defense. The court therefore set aside the conviction, though made in the presence of the accused authorized attorney, and though *there was no question as to notice having been given accused.*"

The petition and attached exhibits, made a part thereof, clearly plead that petitioner was not in custody or jurisdiction of the court on November 21, 1960 (R.6-

90) and no order was ever entered by any court authorizing the issuance of a warrant to deprive petitioner of his liberty, and no warrant was ever issued authorizing the sheriff to deprive the petitioner of his liberty (R.82-85) and no warrant was ever issued authorizing the sheriff to deprive the petitioner of his liberty as required by the Fourth Amendment to the Constitution of the United States of America and attached to and made a part of the petition (R.83) is the commitment to the penitentiary issued by the clerk of the district court without an order of court authorizing the issuance of the same. The petition (R.82) of the record is the warden's certificate pursuant to 29-2801, R. R. S. Neb. 1943, showing execution of the sentence on January 23, 1961, committing this petitioner as convict to the Nebraska penitentiary to serve said void sentence.

The petition further directly raises Article I, Section 9, of the United States Constitution (R.12).

Therefore, argument 1, page 5, of respondent's brief herein is an erroneous statement of the law and facts.

The Nebraska Supreme Court held in *In re Crane's Estate*, 166 Neb. 268, 89 N. W. 2d 44 at page 45 (Syllabus 1), 1958:

> "Courts are bound to take notice of the limits of their authority, and accordingly a court may of its own motion, even though the question is not raised by the pleadings or is not suggested by counsel, recognize the want of jurisdiction, and it is its duty to act accordingly by staying the proceedings, dismissing the action, or otherwise noticing the defect, at any stage of the proceeding."

Thus when the Nebraska Supreme Court attempted to and did defeat petitioner's petition relying on the

void judgment of November 21, 1960, which gave no court any jurisdiction over the body of the petitioner and it was breaching its duty and constitutional authority pursuant to its own statement of the law, last above quoted and was violating this petitioner's Federal Civil Rights and the Bill of Rights of the United States Constitution and particularly the 14th Amendment. Thus the Supreme Court of Nebraska had acquired no jurisdiction over the body of petitioner, in error proceeding, as stated by respondent at page 5 of his brief is false and erroneous, as is the statements of the Nebraska Supreme Court in *Rhodes* v. *Sigler*, 172 Neb. 439, printed in Appendix A, pages 24 and 25, of petitioner's petition herein.

In a district court petition in Nebraska pleader does not designate in the petition the Constitutional provisions and Federal questions raised by petition, but is only required to plead facts that raise the Constitutional questions and provisions, and the provisions are not ordinarily designated by number.

That the allegation of a trial in absentia, on which infamous punishment is imposed automatically raises the Federal question of due process and equal protection of the law under the 5th and 14th Amendments of the United States Constitution.

II.

The Only and Sole Authority Ever Claimed by Respondent For Depriving Petitioner of His Liberty Is the Commitment of November 25, 1960 and Trial in Absentia Judgment of November 21, 1960 For the

Sole Purpose Making Petitioner Serve Said Void Sentence.

Respondent and his attorneys, Clarence A. H. Meyer and Cecil S. Brubaker know they made petitioner serve said void sentence as Convict 21675 as argued by petitioner and do not deny same on page 9 of their brief herein but merely attempt to avoid same by stating at page 9:

> "Petitioner attempts to inject argument as to how he was thereafter treated, to show that he was serving sentence, but none of these matters, whether true or not, appear in the record."

Respondent and his attorneys know they are true. That the only paper respondent had for depriving petitioner of his liberty was the commitment of November 25, 1960 (R.83), which was returned to the Clerk of the District Court of Morrill County on January 24, 1961, after the error proceedings were filed and showing its execution pursuant to its command (R.84) on January 23, 1961, thirty-four days after the purported judgment on which its purported commitment is based was suspended (R.82) and the sheriff if he had delivered petitioner to respondent for any purpose other than serving sentence would have retained the paper of his authority and not returned the same to the clerk of district court as executed (R.84) to-wit:

> "Received this commitment on the 25th day of November, 1960 and as commanded by this commitment I on the 23rd day of January, 1961, delivered the within named Paul E. Rhodes to Nebraska penitentiary at Lincoln, Nebraska."

and the warden would not have issued receipt to clerk of the district court pursuant to 29-2401, R. R. S. Neb. 1943, to-wit (R.82):

> "This Doth certify, that Norval E. Houston, sheriff of Morrill County, Nebraska did on the day of the date hereof, deliver to Nebraska State Penitentiary at Lincoln, Nebraska, the body of Paul E. Rhodes who was tried, convicted and sentenced at the April term, 1960 of the District Court of said county, held at Bridgeport, Nebraska, April 18, 1960.

We must note the language above quoted:

> "who was tried, convicted and sentenced at the April, 1960 term of the District Court of said county, . . ."

can have no other meaning than execution of the void sentence to involuntary servitude, infamous punishment contrary to the 13th Amendment and repugnant thereto without due process of law and equal protection of the law in violation of 14th Amendment of the United States Constitution, Section 1. The petitioner not having been charged with, tried for or convicted of a crime in connection with his commitment to the Nebraska State Penitentiary and the denial of the issuance of the writ of habeas corpus by the District Court of Lancaster County and the Supreme Court of Nebraska denying said writ was a suspension of the writ and the actions of said courts were repugnant to Article I, Section 9 of the United States Constitution and applicable to the States by reason of the 14th Amendment of the U. S. Constitution, *Monroe* v. *Pape*, (1961) 365 U. S. 167, 81 S. Ct. 473.

The part of the Nebraska Supreme Court's opinion printed at pages 9 and 10 of the respondent's brief (*Rhodes* v. *Sigler*, supra) fails to recognize that the United States Constitution requires a written document

of authority to deprive petitioner of his liberty and restrain and commit him to infamous punishment in the Nebraska State Penitentiary and the only documents ever issued were set forth in full in petitioner's petition to the District Court of Lancaster County, Nebraska, and are before this court in the record (R.82,83,84,85), and when these documents fail to meet the Constitutional test of authority under Amendments IV, V, VI, VIII, XIII, and XIV, of the United States Constitution, the sheriff and penitentiary warden are vested with no other authority to deprive and restrain petitioner of his liberty and commit him to involuntary servitude having *no other warrant, writ or other process* authorizing them to restrain petitioner of his liberty and having no authority vested by law in them to keep petitioner committed to the penitentiary restrained of his liberty.

The Supreme Court of Nebraska in its opinion quoted on pages 9 and 10 of respondent's brief (*Rhodes* v. *Sigler*, supra) to-wit:

> "We think it clear from the 21st day of November 1960, when the contempt judgment was rendered, the relator was subject to be taken into custody and held pending further orders of this court."

ignores the facts apparent on the face of the judgment that the same is void on its face, repugnant to the IV, V, VIII, XIII, and XIV Amendments of the United States Constitution and when said void judgment was on January 23, 1961, used as pretended authority to deprive petitioner of his liberty and commit him to infamous punishment, involuntary servitude, the United States Constitution had been violated, petitioner was unlawfully and falsely imprisoned without lawful au-

thority, the state had executed the VOID SENTENCE, without lawful authority and in contempt of the Nebraska Supreme Court order suspending the execution of the judgment of November 21, 1960 (R.81), and almost every conceivable United States Constitutional guarantee has been denied this petitioner.

The Supreme Court of Nebraska entered no order authorizing respondent and Morrill County Sheriff to deprive petitioner of his liberty or ordered him into the custody of the sheriff which it had no jurisdiction to do.

The petitioner further shows the court that on July 29, 1962, petitioner will have completely served said void judgment of involuntary servitude by trial in absentia twice, under two convict numbers, No. 21675 and No. 22107, and this court can take judicial notice that convict numbers are only assigned to those serving sentence on a commitment to the penitentiary.

The Nebraska Supreme Court in *Lingo* v. *Hann*, 71 N. W. 2d 716 at page 719, set forth the requirement for the writ of habeas corpus as follows, to-wit:

> "Habeas corpus a collateral and not a direct proceeding when regarded as a means of attack upon a judgment sentencing defendant."
>
> "Habeas corpus is a writ of right, but not a writ of course, and probable cause must be shown for its allowance."
>
> "In a petition for a writ of habeas corpus, if relator sets forth facts which, if true, would entitle him to discharge, then the writ is a matter of right and the relator should be produced and a hearing held thereon to determine the questions of fact presented, but if relator shows by the facts alleged in his petition for the writ that he is not entitled to relief, the writ should be denied."

". . . if a court or a judge thereof renders a judgment, or who enters an order, has not jurisdiction to perform the act done, either because the proceeding or the law under which it is taken is unconstitutional, or for any other reason the judgment is void, it may be questioned collaterally, and a defendant who is imprisoned under and by virtue of it may be discharged."

"Habeas corpus will not lie to discharge a person from a sentence of penal servitude where the court imposing the sentence had *jurisdiction of the offense, had jurisdiction of the person of the defendant, and the sentence was within the power of the court to impose.*"

"To release a person from a sentence of imprisonment by habeas corpus it must appear that the sentence was absolutely void." (Emphasis supplied)

SUMMARY

Petitioner's petition meets all of these requirements as heretofore pointed out in this brief, (1) trial in absentia is *void* and *gave the court no jurisdiction over the* person of defendant, (2) the court had no power, authority or jurisdiction in contempt proceeding to impose sentence to penitentiary at hard labor, infamous punishment as pointed out at pages 15 and 16 of petitioner's petition to this court in the case at bar, (3) the judgment of November 21, 1960, under pretended authority of which the respondent and Nebraska Supreme Court pretend to commit petitioner are absolutely void as repugnant to the V, VI, VIII, XIII, and XIV Amendments of the United States Constitution and the court was without power, authority or jurisdiction to enter such judgment and on June 23, 1961, when the Nebraska Supreme Court attempted to and did inject

Section 29-1001, R. R. S. Neb. 1943, into the issue in the case in its opinion of *Rhodes* v. *Sigler*, supra, it was repugnant to the United States Constitution, Amendment XIV, because it would be a denial of the law guaranteed by said amendment to impose infamous punishment and involuntary servitude (commitment to the penitentiary at hard labor) before final judgment, that it would have no power, authority or jurisdiction to impose after final judgment.

Further the Nebraska Supreme Court on May 26, 1961, had no jurisdiction to invade the legislative field in *McFarland* v. *State*, 172 Neb. 251 at page 256 repeal 29-2801, R. R. S. Neb. 1943, and repeal by the court's opinion said section of the statute 29-2801, R. R. S. Neb. 1943, and deprive county courts and district courts of jurisdiction where petitioner was deprived of his liberty unlawfully, and said opinion is repugnant to Article II, Section 1 of the Nebraska Constitution, quoted at page 7 of petitioner's petition herein and is thereby a denial of due process and equal protection of the law clause of the 14th Amendment of the United States Constitution, and invasion of the legislative field by the Nebraska Supreme Court.

That the allegation of trial in absentia in petition in district court when infamous punishment was imposed automatically raises Federal question of due process of law and equal protection of law pursuant to 5th and 14th Amendments of United States Constitution.

Note Second Commitment being made to serve second time same void sentence, without being granted discharge on first commitment and warden's receipt, Appendix C, in this brief on pages 34-36.

CONCLUSION

For the foregoing facts and reasons, this petition for writ of certiorari to the Nebraska Supreme Court should be granted, or in the alternative, and in the interest of justice considering how slowly the wheels of justice turn, the court consider the petition as an original application for writ of habeas corpus and grant writ of habeas corpus to petitioner herein, and against respondent, and if the matter is set for later hearing, that the court fix bail for petitioner during pendency of the proceeding, and enter all orders the interest of justice require, and order prisoner discharged from custody and restored to his liberty.

Respectfully submitted,

PAUL E. RHODES, *pro se*,
Convict No. 22107, Nebraska
State Penitentiary without
being charged, tried for,
or convicted of a crime.

APPENDIX B

(Filed Jan. 16, 1961)

IN THE DISTRICT COURT OF CHEYENNE COUNTY, NEBRASKA

PETITION

PAUL E. RHODES, RELATOR AND PLAINTIFF
vs.
W. W. SCHULZ and KERMIT BRUMBAUGH,
RESPONDENTS AND DEFENDANTS

Comes now your petitioner, Paul E. Rhodes, and respectfully shows to the Honorable John H. Kuns, judge of the District Court of Cheyenne County, Nebraska, that he is unlawfully imprisoned and restrained of his liberty by W. W. Schulz, sheriff and jailor thereof, and Kermit Brumbaugh, deputy sheriff, both of Cheyenne County, Nebraska.

That the imprisonment and restraint are illegal and that the illegality thereof is under and by virtue of a pretended judgment and sentence; and a commitment based thereon which your petition has not seen and does not have a copy thereof, said pretended judgment and sentence is in substance as follows:

"IN THE DISTRICT COURT FOR MORRILL COUNTY, NEBRASKA

(CASE NO. 4819 Page 604 & Page 605)

THE STATE OF NEBRASKA, PLAINTIFF,
vs.
PAUL E RHODES, DEFENDANT

JOURNAL ENTRY

(Filed November 25, 1960)

Now on this 21st day of November, 1960, one of the regular days of the September 1960 term of court, this matter came on further to be heard upon the

motion of the defendant for a continuance on the ground of his claim of physical illness and inability to attend trial. The State was represented by County Attorney, James L. Macken. The defendant was not present and was not represented by counsel although duly notified of this hearing. Evidence was adduced by the State tending to show considerable physical activity on the part of the defendant, wholly inconsistent with defendant's claim of physical inability to attend trial. The court being fully advised in the premises finds that defendant's motion for continuance filed this date should be, and is hereby overruled.

This matter came on further to be heard upon the motion of defendant for dismissal of the information, and said motion is hereby overruled.

This matter came on further to be heard upon the merits. The State introduced additional evidence pursuant to the order of the court heretofore entered permitting the State to withdraw its rest, and the matter was submitted to the court, and the court being fully advised in the premises finds the defendant guilty of contempt as charged and that he should be sentenced to confinement in the Nebraska State Penitentiary for a period of nine (9) months at hard labor, Sunday and holidays excepted, and to pay a fine of two thousand five hundred dollars ($2,500.00) and the costs of this proceeding.

IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED that the defendant, Paul E. Rhodes, is guilty of contempt of court as charged and is hereby sentenced to confinement in the Nebraska State Penitentiary at Lincoln, Nebraska, for a period of nine (9) months at hard labor, Sundays and holidays excepted, and to pay a fine in the amount of two thousand five hundred dollars ($2,500.00) and the costs of this proceeding.

BY THE COURT:
s R. M. Van Steenberg
District Judge"

Your petitioner alleges that the judgment and sentence so pronounced by the said purported District Judge, R. M. Van Steenberg was and is null and void, and of no force and effect, for the reason the District Judge or purported district judge had no jurisdiction to try said action in the absence of the defendant, relator in this action, and had no jurisdiction or authority to enter judgment and to pass sentence in the absence of the defendant, relator in this action, that a copy of the complaint and proceedings from August 1, 1960 to September 10th, 1960 are hereto attached Marked "Exhibit A" and made a part hereof as fully as though herein set out at length, and that the court had no jurisdiction, power or authority, to pronounce judgment and sentence of fine and imprisonment in the Nebraska State Penitentiary at hard labor for nine months and fine of $2,500.00 for the offense of contempt of court charged in the complaint, contempt of court not being a crime, and was without authority jurisdiction, power or authority to pronounce a sentence at hard labor and that the same violates Article 1, Section 2 of the Constitution of the State of Nebraska, and the Thirteenth Amendment to the Constitution of the United States of America, and constitutes involuntary servitude and slavery prohibited by said constitutions.

That this relator was discharged from said unlawful imprisonment in said aforesaid case being case number 4819 in the District Court of Morrill County, Nebraska, by a Writ of Habeas Corpus and Discharge duly entered by the County Court of Morrill County, Nebraska, on September 2, 1960, which judgment and discharge was not appealed and is now a final judgment of record, a duly certified and authenticated copy of said order of discharge is hereto attached marked Exhibit B and herein made a part of this petition the same as if copied in full herein, and that said discharge deprived the District Court of Morrill County, Nebraska, and R. M. Van Steenberg of all jurisdiction over the relator in this action and defendant in case No. 4819 in the District Court of Morrill County, Nebraska, and that said court had no

jurisdiction, power or authority, to try this relator, to pronounce judgment and sentence of fine and imprisonment thereafter on the charge of contempt, and had no jurisdiction, power or authority in case No. 4819 in the District Court of Morrill County, Nebraska being State of Nebraska vs. Paul E. Rhodes, on November 21, 1960.

That case No. 4819 referred to in the District Court of Morrill County, Nebraska is derivative of Cases No. 4772 being State of Nebraska -vs- Paul E. Rhodes and Case No. 4788 in the District Court of Morrill County, Nebraska, Paul E. Rhodes, -vs- Norval E. Houston et. al., and that R. M. Van Steenberg District Judge of the 17th judicial district disqualified himself because of bias and prejudice in both case No. 4772 and case No. 4788, and was therefore disqualified and without jurisdiction because of self declared disqualification in the last aforesaid mentioned cases in case No. 4819 and so interwoven and interdependent that the disqualification in the other cases could not be disregarded and was an attempt to usurp the jurisdiction of the Honorable Edmund Nuss of his rightful jurisdiction in case No. 4788 and to deprive the District Court of Morrill County, Nebraska of the Body of Paul E. Rhodes in case No. 4788 in which he is custodia legis and gramia legis and the same being a habeas corpus proceeding and therefore any pretended judgment entered by R. M. Van Steenberg in case No. 4819 was entered without jurisdiction, power or authority to try said cause, enter judgment on November 21, 1960 and pronounce sentence on November 21, 1960 in case No. 4819.

That the purported action of R. M. Van Steenberg on November 21, 1960 heretofore referred to was an attempt to suspend the Writ of Habeas Corpus contrary to Article 1, Section 8 of the Constitution of the State of Nebraska, and Article 1, Section 9 of the constitution of the United States of America, and unconstitutional and contrary to said constitutions and to deprive the relator of this action of his civil rights guaranteed by both aforesaid mentioned constitutions.

That this relator was discharged from said unlawful imprisonment in said aforesaid case being case number 4819 in the District Court of Morrill County, Nebraska, by a Writ of Habeas Corpus and Discharge duly entered as above alleged.

That this relator was denied due process of law in case No. 4819 in the district court of Morrill County, Nebraska as above set out and was not given a trial by jury all contrary to article 1, Section 3 of the Constitution of State of Nebraska and the 14th Amendment to the Constitution of United States of America.

Wherefore, your petitioner prays, that a writ of habeas corpus be granted; and directed to W. W. Schulz, sheriff and jailor thereof, of the County of Cheyenne and State of Nebraska, and Kermit Brumbaugh, his deputy sheriff, of county and state aforesaid, commanding them to have the body of your petitioner before the District Court of Cheyenne County, Nebraska at a time and place therein to be specified to do and obey what shall then and there be ordered by said court concerning petitioner, together with the time and place and cause of this detention, and said writ, and that your petitioner may be discharged and restored to his liberty.

/s/ Paul E. Rhodes

State of Nebraska)
) ss.
County of Cheyenne)

Paul E. Rhodes, being first duly sworn upon oath, deposes and says that he is the plaintiff, relator, in the above entitled action and that he has read the foregoing petition and that he knows the facts therein contained and that the facts therein contained are true as he verily believes.

/s/ Paul E. Rhodes

Subscribed and sworn to before me this 16th dav of January, 1961.

/s/ Ruby Spindler Henkle
Clerk of District Court
Cheyenne County

My commission expires

(Filed District Court Cheyenne County, Jan. 16, 1961)

IN THE DISTRICT COURT OF CHEYENNE, COUNTY, NEBRASKA

Paul E. Rhodes, Relator and Plaintiff

-vs-

W. W. Shulz and Kermit Brumbaugh, Respondents and Defendants

WRIT OF HABEAS CORPUS

State of Nebraska)
) ss.
County of Cheyenne)

To W. W. Schulz and Kermit Brumbaugh deputy sheriff:

You are hereby commanded to have the body of Paul E. Rhodes, by you unlawfully deprived of his liberty as is alleged, and together with the cause of his detention before John H. Kuns, judge of the district court, at the courthouse in Sidney, Nebraska, forthwith and then and there to be delt with according to law, and have you then and there this writ.

Witness Ruby Spindler Henkle, Clerk of the district court, Cheyenne County and the said seal of said court fixed hereto this 16th day of January, 1961.

/s/ Ruby Spindler Henkle
Clerk of the District Court

(Filed District Court Cheyenne County, Jan. 16, 1961)

IN THE DISTRICT COURT OF CHEYENNE COUNTY, NEBRASKA

Paul E. Rhodes, Relator and Plaintiff

-vs-

W. W. Schulz and Kermit Brumbaugh, Respondents and Defendants

RETURN TO WRIT OF HABEAS CORPUS

Comes now W. W. Schulz, respondent, and the person upon whom the writ of habeas corpus was served in this case, and for his return and answer to the same alleges:

1. Admits that he has the said Paul E. Rhodes in his custody, power and under restraint.

2. That the authority and true and whole cause of such imprisonment is by reason of the direction of the County Attorney of Morrill County, Nebraska, James L. Macken and the Sheriff of Morrill County, Nebraska, Norval Houston, pursuant to an order Judgment and Journal Entry of the District Court of Morrill County, Nebraska of November 21, 1960, a copy of which is hereto attached and herein made a part of this return the same as if copied in full herein. That a copy of said warrant of commitment is hereto attached and herein made a part of this return the same as if copied in full herein. In obedience to the writ of habeas corpus issued herein he now produces the body of said Paul E. Rhodes before John H. Kuns, District Judge of Cheyenne County, Nebraska and the District Court of Cheyenne County, Nebraska, to be dealt with according to law.

/s/ W. W. Schulz
Sheriff of Cheyenne County, Nebraska

Appendix

(Filed District Court Cheyenne County, Jan. 16, 1961)

IN THE DISTRICT COURT OF CHEYENNE, COUNTY, NEBRASKA

Paul E. Rhodes, Relator and Plaintiff

-vs-

W. W. Schulz and Kermit Brumbaugh, Respondents and Defendants

ORDER IN HABEAS CORPUS

On reading the petition of Paul E. Rhodes duly verified whereby it appears that he is illegally imprisoned and restrained of his liberty by W. W. Schulz, Sheriff of Cheyenne County, Nebraska, and stating wherein the illegality consists from which it appears that he is entitled to a writ of habeas corpus and that the same shall issue; produced to me a copy of the order of conviction and commitment and cause of his detention by which said Paul E. Rhodes is deprived of his liberty, and it appearing to me that the said Paul E. Rhodes is unlawfully detained, it is therefore ordered that a writ of habeas corpus be allowed to issue in favor of Paul E. Rhodes, returnable forthwith and directed to W. W. Schulz, sheriff, and Kermit Brumbaugh deputy sheriff.

BY THE COURT

/s/ John H. Kuns
District Judge

In the District Court of Cheyenne County, Nebraska

(FILED District Court of Cheyenne County Jan. 20, 1961.)

No. 6617

PAUL E. RHODES, RELATOR AND PLAINTIFF,

VS.

W. W. SCHUTZ and KERMIT BRUMBAUGH,
RESPONDENTS AND DEFENDANTS.

JOURNAL ENTRY

ON THIS 16th day of January, 1961, on reading the petition of Paul E. Rhodes alleging that he is illegally imprisoned and restrained of his liberty by respondents, the sheriff and deputy sheriff, respectively, of Cheyenne County, Nebraska, it is ordered that a writ of habeas corpus issue out of and under the seal of the District Court of Cheyenne County, Nebraska directed to respondents, commanding them to have the body of Paul E. Rhodes before the court forthwith, to do and receive what shall then and there be considered concerning him, together with the time and cause of his detention, and that he have then and there such writ of habeas corpus together with his return or pleading thereto.

Thereafter on the same day, the respondents having produced the body of Paul E. Rhodes before the court and made return to the writ of habeas corpus, it is ordered that respondents be allowed 10 days to file further pleadings, and that bail for the release of relator be fixed at the sum of $1,000.00.

And thereafter, on the same day, the court having carefully examined the petition and the return to the writ of habeas corpus, and it appearing to the court that the order of the District Court of Morrill County, Nebraska set out in the petition and referred to in the return is not a warrant or commitment, on the court's own motion it is ordered that the relator be discharged on the sole ground that his arrest by respondents was not by virtue of any warrant or order of commitment.

It is further ordered that the court's earlier order fixing bail be and it is hereby vacated.

BY THE COURT:

/s/ John H. Kuns
Judge

APPENDIX C

(Filed November 3, 1961, /s/ Virginia A. Schuetz, Clerk District Court)

IN THE DISTRICT COURT OF MORRILL COUNTY, NEBRASKA

No. 4819

THE STATE OF NEBRASKA, Plaintiff

v.

PAUL E. RHODES, Defendant.

COMMITMENT

STATE OF NEBRASKA)
) SS.
MORRILL COUNTY)

THE STATE OF NEBRASKA, MORRILL COUNTY, TO THE SHERIFF OF SAID COUNTY:

WHEREAS, at a regular term of the District Court of Morrill County, Nebraska, commenced on April 18, 1960, Clarence S. Beck, Attorney General of Nebraska came in to court on July 29, 1960 and presented a certain information in due form of law against Paul E. Rhodes, charging said Paul E. Rhodes with contempt of the District Court of Morrill County, Nebraska, which information was duly filed and the cause docketed, and

WHEREAS afterwards on August 1, 1960, September 6th and 7th, 1960 and November 21, 1960, further proceedings were had upon said information, to-wit: the defendant Paul E. Rhodes was brought before the court, notified of the accusation against him and allowed time to make his defense, trial was had to the court upon the information, the answer of defendant Paul E. Rhodes, and the evidence, and the court upon consideration thereof found the defendant guilty of contempt of court as charged in the information, and

WHEREAS, on November 21, 1960, the court entered judgment and sentenced the said Paul E. Rhodes in these words:

> "IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED that the defendant, Paul E. Rhodes, is guilty of contempt of court as charged and is hereby sentenced to confinement in the Nebraska State Penitentiary at Lincoln Nebraska, for a period of nine (9) months at hard labor, Sundays and holidays excepted, and to pay a fine in the amount of two thousand five hundred dollars ($2,500.00) and the costs of this proceeding."

AND, WHEREAS, on December 23, 1960, the said Paul E. Rhodes having filed a petition in error in the Supreme Court of Nebraska, the Supreme Court suspended execution of said judgment as prayed by the defendant Paul E. Rhodes, and issued a writ of error to the District Court of Morrill County, Nebraska, which was filed in the District Court of Morrill County, Nebraska on December 27, 1960, which writ of error duly notified the District Court of Morrill County, Nebraska, that execution of such judgment and sentence had been suspended, and

WHEREAS, thereafter during the September term, 1961, of the Supreme Court of Nebraska it was considered and adjudged by the Supreme Court that such error proceedings be dismissed for failure to file briefs under the provision of Rule 15 of the Supreme Court, and judgment of dismissal was accordingly rendered, and

WHEREAS, thereafter on October 17, 1961 the Supreme Court of Nebraska duly issued its mandate to the District Court of Morrill County, Nebraska reciting the entry of such judgment dismissing said error proceedings and remanding the cause to the District Court, which mandate was received and filed in the District Court of Morrill County, Nebraska on October 18, 1961.

You are therefore commanded to proceed to execute said sentence, judgment and order of the court.

WITNESS my hand and the seal of said court at Bridgeport, Nebraska this 30th day of October, 1961.

's/ Virginia A. Schuetz
Clerk of the District Court

State of Nebraska)
) ss.
County of Morrill)

Received this Commitment on the 30th day of October, 1961 and as commanded by this Commitment, I on the 2nd day of November, 1961 delivered the within named Paul E. Rhodes to the Nebraska State Penitentiary at Lincoln, Nebraska.

Dated this 3rd day of November, 1961.

's/ Norval E. Houston, Sheriff

Fees:

Mileage Train Fare	$ 26.68
Meals & Room	12.45
Filed for with County	$ 39.13

NEBRASKA STATE PENITENTIARY

Lincoln, Nebraska, Nov. 2, 1961

To the Clerk of Court:

This Doth Certify, That Norval E. Houston, Sheriff of Morrill County, Nebraska, did, on the day of the date hereof, deliver to the Nebraska State Penitentiary, at Lincoln, Nebraska, the body of Paul E. Rhodes who was tried, convicted, and sentenced at the December Term, 1960, of the District Court of said County, held at Bridgeport, Nebraska, November 21, 1960.

(Signed) Maurice H. Sigler
Warden of Penitentiary